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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID RAYMOND BEAVERS,

Defendant and Appellant.

D063943

(Super. Ct. No. SCD244693)

APPEAL from a judgment of the Superior Court of San Diego County,

Runston G. Maino, Judge. Affirmed.

Laurel M. Nelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Scott C. Taylor and Parag Agrawal, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found David Raymond Beavers guilty of possessing cocaine base for sale. He appeals, contending (1) the trial court improperly denied his *Marsden*

motion for substitution of counsel (*People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*)) and request for a continuance, (2) there was insufficient evidence to support his conviction, and (3) the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of simple possession. We affirm the judgment.

FACTUAL BACKGROUND

On an evening in November 2012, San Diego Police Narcotics Detective Lisa Davies performed surveillance in the East Village area of San Diego in an attempt to identify people engaged in narcotics activity. She saw Beavers standing on the street next to a shopping cart piled high with blankets and draped with an American flag. Detective Davies noticed that Beavers would stray from the cart and then return to it when someone else made contact with him. At that point, Beavers would put his hand between the blankets piled in the cart, return to the person who contacted him, and engage in a hand-to-hand exchange. When Beavers walked away from the cart, two other individuals would stand near it as if they were protecting it. Detective Davies did not see anyone other than Beavers reach into the shopping cart.

Detective Davies observed Beavers engage in approximately 10 similar transactions in a 30- to 45-minute time span. Each exchange took between 15 to 45 seconds. On a couple occasions, Detective Davies saw the people who interacted with Beavers walk not too far away and light what she thought was a crack pipe.

Detective Davies alerted Detective James Clark regarding Beavers's activities. Detective Clark went to the area and saw Beavers with the shopping cart draped with an American flag. Detective Clark saw Beavers reaching into the fold of a blanket in the cart. He also saw two other individuals near the cart, but did not observe them going into the cart.

During the time that Detective Clark observed the area, he saw Beavers engage in three hand-to-hand exchanges. During one of those transactions, Detective Clark saw a person hand Beavers cash and some sort of exchange take place. Detective Clark also saw Beavers meet with three people and huddle together. Detective Clark believed that the three individuals may have collected money from Beavers.

Detective Clark thought Beavers was selling drugs and radioed for uniform officers to contact Beavers. After the uniform officers arrived, Detective Clark searched the shopping cart. He discovered 13 pieces of rock cocaine plus some smaller fragments, totaling 2.67 grams, hidden in the fold of a blanket in the cart. The size of each rock was consistent with what a narcotics dealer would sell on the street for \$20. The officers also searched Beavers but did not find cocaine or money on him.

Based on his observations, training, and experience, Detective Clark opined that Beavers possessed cocaine for sale. Detective Clark came to this conclusion due to the hand-to-hand exchanges and the amount of narcotics found. He also

testified that, in general, a user does not buy or possess more than he or she plans to smoke at one particular time.

DISCUSSION

I. *Marsden Motion and Request for Continuance*

A. Additional Background

In early February 2012, the court held a hearing under *Marsden, supra*, 2 Cal.3d 118, based on Beavers's request for substitution of appointed counsel. During that hearing, Beavers explained that he wanted new counsel because his current counsel was not putting his "best foot forward to represent" Beavers. According to Beavers, although trial was scheduled to begin, he had not had a "one-on-one" with his attorney. Beavers later clarified that he had one meeting with his counsel, but during that meeting, they only discussed the district attorney's case and not his defense.

The court inquired whether Beavers believed there was something his defense counsel should have done. Beavers explained that he wanted his attorney to understand that the cocaine was not his and that he was not in possession of it at any time. At that point, the court reassured Beavers that it was familiar with his defense counsel from other cases and had always known him to do a good job.

Defense counsel stated that he had two jail house interviews with Beavers, one of which consisted of going over the facts of the case. Defense counsel recited the facts of the case, stated he was aware that Beavers disputed possession, and informed the court that he advised Beavers regarding the state of the evidence and

meaning of constructive possession. Defense counsel also stated that there was no reason why he could not give Beavers's case full consideration.

Beavers responded by telling the court that there had been no investigation done and that defense counsel should have gone to the crime scene. Beavers elaborated by stating that defense counsel should have taken pictures of the crime scene and asked people there if others were around the shopping cart on the evening of the incident. The court reminded Beavers that the alleged crime happened months ago and that he needed to provide his counsel with specifics on who or what to look for because there was no need for counsel to go to the scene to simply look around.

After the trial court denied Beavers's *Marsden* motion, he requested to represent himself. The court explained that it was not likely to grant a continuance of the trial based on Beavers's self-representation. Thereafter, the court granted Beavers's request to represent himself and appointed a legal runner from the Office of Assigned Counsel (OAC) for him.

The next day, the clerk informed the court that Beavers felt overwhelmed and had not dressed out for court that day. Beavers stated that he could represent himself, but he did not have his glasses and paperwork. Beavers also stated that he needed at least a two-week continuance so that his legal runner could investigate the crime scene. The prosecutor opposed Beavers's request for a continuance and advised the court that two witnesses had scheduling conflicts after one week.

Accordingly, the court granted a one-week continuance. Beavers indicated the continuance was acceptable to him.

That same day, the prosecutor gave Beavers documents that she intended to use to prove prior sentencing allegations and showed him video evidence although she did not intend to use it in her case in chief. The court informed Beavers that it would take a few days for the OAC to set up Beavers's file, but the OAC director could come to court to find out what needed to be done.

B. *Marsden* Motion

Beavers contends the trial court did not make a proper inquiry in considering his *Marsden* motion and erred in denying this motion. Neither contention has merit.

When a defendant seeks to discharge his appointed counsel and have another attorney appointed because of inadequate representation, the trial court must permit the defendant to explain the basis of his contention and relate specific instances of the attorney's inadequate performance. (*Marsden, supra*, 2 Cal.3d at p. 124.) A defendant is entitled to have new counsel appointed if the challenged counsel is not providing adequate representation or if defendant and counsel have such an irreconcilable conflict in their relationship that ineffective representation is likely to result. (*People v. Fierro* (1991) 1 Cal.4th 173, 204.) The trial court has broad discretion in determining whether the defendant has made an adequate showing (*People v. Smith* (1993) 6 Cal.4th 684, 696), and the denial of a *Marsden* motion "is not an abuse of discretion unless the defendant has shown that a failure to

replace the appointed attorney would 'substantially impair' the defendant's right to assistance of counsel." (*People v. Webster* (1991) 54 Cal.3d 411, 435.)

Here, Beavers complained that his defense counsel did not conduct a proper investigation of his case because he did not go to the crime scene. He contends that rather than inquire into counsel's investigation, the court merely assured him that defense counsel had been successful in past trials. This argument mischaracterizes the *Marsden* proceedings.

The record demonstrates that the court conducted a thorough inquiry to determine the source of Beavers's dissatisfaction with defense counsel and defense counsel's preparation of the case. The court first inquired into whether Beavers believed his counsel should have done something to prepare the case that was not done. After Beavers indicated that defense counsel should have gone to the crime scene, the court stated that the alleged crime occurred months earlier and there was no reason for defense counsel or his investigator to go to the area to look around without having some indication from Beavers of what to look for. Beavers responded by stating that he "just wanted him to investigate, have pictures of the area, and we could have took it from there." This failed to show inadequate representation. Rather, the facts suggest a disagreement concerning trial tactics. However, a "[d]isagreement concerning tactics, by itself, is insufficient to compel discharge of counsel." (*People v. Smith* (2003) 30 Cal.4th 581, 606.)

In addition to inquiring into Beavers's concerns, the court heard from defense counsel regarding his preparation of the case and knowledge of the prosecutor's

evidence. Based on defense counsel's lengthy recitation of the evidence, the court opined that he had a "good handle" on the matter. The court informed Beavers that although defense counsel may have presented the prosecutor's version of the evidence to him, it did not mean that counsel could not provide adequate representation. Rather, counsel would be doing a disservice to Beavers if he did not tell him the truth.

Based on the record, we conclude that the trial court conducted a proper *Marsden* inquiry and did not abuse its discretion in declining to substitute counsel.

C. Request for Continuance

Beavers contends the trial court abused its discretion in denying his request for a two-week continuance.

The trial court has broad discretion to determine whether good cause for a continuance exists (*People v. Roldan* (2005) 35 Cal.4th 646, 670), although the defendant's constitutional rights to counsel and due process of law preclude that discretion from being exercised in such a way as to deprive the defendant or his attorney of a reasonable opportunity to prepare a defense and respond to the charges. (*People v. Sakarias* (2000) 22 Cal.4th 596, 647; *People v. Bishop* (1996) 44 Cal.App.4th 220, 231.) Nevertheless, the defendant's burden on appeal is to establish that the trial court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. (See *People v. Jordan* (1986) 42 Cal.3d 308, 316.)

Here, Beavers requested a two-week continuance for the purpose of allowing his legal runner to investigate the crime scene. The court granted a one-week continuance and went over the trial schedule with Beavers. Beavers indicated that the continuance and schedule were acceptable to him. Thereafter, the court indicated that although it would take a few days for the OAC to set up a file for Beavers and assign an investigator, the OAC director suggested that he come to court to talk with Beavers and find out what needed to be done. Beavers agreed to this approach. The record does not indicate whether the OAC director had this meeting with Beavers; however, there is no indication that Beavers requested a further continuance or alerted the court to a problem with receiving assistance from his legal runner. Moreover, Beavers does not explain how a one-week rather than a two-week continuance deprived him a reasonable opportunity to prepare his defense.

We also reject Beavers's arguments that the trial court abused its discretion in denying his request for a two-week continuance because he did not receive documents that the prosecutor intended to use to prove prior sentencing allegations and video evidence until the day of his request. Beavers did not request a continuance on that basis at trial. Moreover, the court continued the trial for one week after Beavers received the prosecutor's documents and viewed the video evidence. Beavers failed to show that he was unable to prepare his defense as a result of not receiving the documents and video evidence until the day of his continuance request.

On this record, we cannot conclude that the trial court's decision was made in an arbitrary, capricious or patently absurd manner or that it resulted in a manifest miscarriage of justice.

II. *Sufficiency of the Evidence*

Beavers argues there was insufficient evidence to support his conviction. Specifically, he contends there was no substantial evidence to establish that (1) he possessed or had the right to control the rock cocaine, and (2) he intended to sell or trade it. We disagree.

When a defendant challenges the sufficiency of the evidence on appeal, "we review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] In cases in which the People rely primarily on circumstantial evidence, the standard of review is the same." (*People v. Thomas* (1992) 2 Cal.4th 489, 514.) Reversal on the ground of insufficient evidence is unwarranted unless it appears that under no hypothesis whatsoever is there sufficient substantial evidence to support the conviction. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

"A person is guilty of the crime of illegal possession for the sale of cocaine . . . when he or she (1) exercised control over the cocaine, (2) had knowledge of its presence and knowledge of its nature as a controlled substance, (3) the substance was in an amount sufficient to be used for sale as a controlled substance, and (4) he

or she possessed the controlled substance with the specific intent to sell it." (*In re Christopher B.* (1990) 219 Cal.App.3d 455, 466.)

Beavers argues the record lacks evidence to support findings that he possessed cocaine base and intended to sell it. "Unlawful possession of narcotics is established by proof that the defendant had, among other things, physical or constructive possession of the contraband." (*People v. Francis* (1969) 71 Cal.2d 66, 71.) "The [defendant] has constructive possession when he maintains control or a right to control the contraband." (*Ibid.*) Although possession may be proved by evidence that the contraband was found in a place to which the defendant had exclusive access, exclusivity is not a requirement. (*People v. Redrick* (1961) 55 Cal.2d 282 [contraband found in a storeroom of a rooming house in which the defendant had joint access]; *People v. Maese* (1980) 105 Cal.App.3d 710 [defendant was one of several occupants of a house in which contraband was found]; *People v. White* (1970) 11 Cal.App.3d 390 [defendant was one of multiple occupants of a house in which contraband was found].)

Here, officers found 2.67 grams of cocaine hidden in the fold of a blanket in a shopping cart. Two detectives observed Beavers reach into that cart multiple times. Detective Davies observed Beavers for 30 to 45 minutes, and Detective Clark observed him for 10 minutes. During that time, neither detective saw another person reach into the cart. Beavers left and returned to the cart numerous times. This evidence was sufficient to support a finding that Beavers had dominion and control over the shopping cart and its contents.

Likewise, the evidence was sufficient to support a finding that Beavers intended to sell the rock cocaine. "[I]ntent is inherently difficult to prove by direct evidence. Therefore, the act itself, together with its surrounding circumstances must generally form the basis from which the intent of the actor may legitimately be inferred.'" (*People v. Edwards* (1992) 8 Cal.App.4th 1092, 1099.) Further, a police officer who is an expert in narcotics interdiction is ordinarily experienced with the habits of those who possess drugs for their own use and those who possess drugs for sale. (See *People v. Hunt* (1971) 4 Cal.3d 231, 237-238.) In this regard, a possession for sale conviction may be supported by the opinions of experienced officers stating the drugs are held for purposes of sale based on such matters as quantity, packaging and normal use of an individual. (*People v. Parra* (1999) 70 Cal.App.4th 222, 227.)

In this case, the evidence showed that Detective Clark was an experienced officer with special training in narcotics sales. He investigated hundreds of cases involving possession of rock cocaine for sale, stating it was "the common narcotic in the East Village area." In Detective Clark's opinion, Beavers possessed the rock cocaine with the intent to sell. Detective Clark came to this conclusion due to the hand-to-hand exchanges he witnessed and the amount of rock cocaine found in the shopping cart. He also testified that, in general, a user does not buy or possess more than he or she plans to smoke at one particular time. Based on this evidence, a jury could reasonably have found Beavers possessed the rock cocaine for sale.

In sum, we conclude the jury's verdict was supported by substantial evidence.

III. *Lesser Included Offense Instruction*

Beavers argues the trial court erred in failing to instruct the jury sua sponte on the lesser included offense of simple possession. We reject this argument.

The court has a sua sponte duty to instruct the jury on lesser included offenses when the evidence raises a question as to whether all of the elements of the charged offense were present. (*People v. Birks* (1998) 19 Cal.4th 108, 118.) "In deciding whether there is substantial evidence of a lesser offense, courts should not evaluate the credibility of witnesses, a task for the jury." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) Instructions on lesser included offenses are required only if the evidence would justify a conviction of the lesser included offense. (*People v. Lopez* (1998) 19 Cal.4th 282, 287-288; *People v. Leach* (1985) 41 Cal.3d 92, 106.)

Here, the People assert that Beavers invited any error in the court's instructions because the record shows he affirmatively requested that the court not give a lesser included offense instruction on simple possession. Although the "doctrine of invited error" will generally preclude a defendant from gaining a reversal on appeal because the instructional error was made by the court at the defendant's request (see *People v. Lara* (1994) 30 Cal.App.4th 658, 673), we need not determine whether the record shows such affirmative invitation in this case as

application of the above rules reveals no instructional error regarding the lesser included offense of simple possession.

The evidence did not support a conviction of the lesser offense of simple possession. Beavers's defense was that he did not have possession of the shopping cart and knowledge of its contents. However, the uncontested evidence showed that officers found 2.67 grams of cocaine hidden in the fold of a blanket in a shopping cart and observed Beavers exert control over the cart because he reached into it multiple times. The officers also saw Beavers engage in multiple hand-to-hand transactions. The evidence indicated that if the jurors believed the officers, then Beavers was guilty of possessing cocaine base for sale. There was no evidence that Beavers possessed cocaine for personal use. Thus, the court had no duty to sua sponte instruct on simple possession.

DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

BENKE, Acting P. J.

O'ROURKE, J.